ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, JUDGE

DIVISION III

CACR05-989

April 4, 2007

CHRISTOPHER BRANNING APPELLANT	APPEAL FROM THE BOONE COUNTY CIRCUIT COURT [NO. CR2004-244-4]
V.	HONORABLE GORDON WEBB, CIRCUIT JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED IN PART; REVERSED AND DISMISSED IN PART

This case is back before us after we ordered rebriefing to correct deficiencies in the brief's abstract and addendum. A jury found Christopher Branning guilty of second-degree stalking, two counts of first-degree terroristic threatening, and misdemeanor violation of a protection order, for which he was sentenced to concurrent terms of 120 months, 72 months, 72 months, and 259 days, respectively, in the Arkansas Department of Correction. On appeal, he argues that the trial court erred in denying his motion to dismiss based on double-jeopardy grounds and his motion to dismiss based on speedy-trial grounds. We affirm in part and reverse and dismiss in part.

The events providing the factual predicate to Branning's convictions arose after

Branning and his wife, Heather Branning, separated, and visitation with his children became a contentious issue. It was stipulated in circuit court that Branning was arrested on December 3, 2003, and charged in Harrison District Court with four misdemeanors: harassing communications, terroristic threatening, carrying a weapon, and second-degree assault. Pursuant to an agreement with the State, on May 5, 2004, Branning pleaded guilty to carrying a weapon and second-degree assault, and was placed on suspended imposition of sentence. The two other charges were nolle prossed.

On January 27, 2005, the State charged Branning by amended information with six offenses: second-degree stalking, first-degree criminal mischief, criminal trespass, violation of a protective order, and two counts of first-degree terroristic threatening.[1] Significantly, the information recited that the stalking offense was based on conduct that occurred from December 2003 through June 7, 2004, count one of terroristic threatening accrued on December 3, 2003, and count two on May 15, 2004, and the violation-of-an-order-of-protection charge involved conduct that allegedly occurred on June 7, 2004.

Branning first argues on appeal that the trial court erred in denying his dismissal motion based on double jeopardy because he had already been charged and convicted of misdemeanors arising out of the same occurrence. He asserts that the "nolle prossing of the two charges were obviously part of a plea arrangement." Accordingly, he contends that he

[1] The first-degree criminal mischief and criminal trespass charges were severed and are not germane to this appeal.

was "placed in jeopardy for all events occurring on December 3, 2003," and that successful prosecution of him in district court precluded him from being charged with the same acts at some later date, "as the element in a multi-element stalking charge." Branning urges us to find analogous *Hobbs v. State*, 43 Ark. App. 149, 862 S.W.2d 285 (1993), claiming that "there was only one time, one place, and one set of victims, and [he] was charged twice in two courts for the same thing and was convicted both times." Further, he argues that "if the convictions for stalking and terroristic threatening stand, then there will never be a way to distinguish what effect the acts for which [he] was convicted in District Court had upon the finding of guilt or upon the setting of punishment." He contends that he was "certainly punished twice for the same events of December 3, 2003." We find merit in Branning's double-jeopardy argument.

When we take up the denial of a motion to dismiss on double-jeopardy grounds on appeal, we review questions of law de novo and when the analysis presents itself a mixed question of law and fact, the factual determinations made by the trial court are given due deference and are not reversed unless clearly erroneous. *Muhammad v. State*, 67 Ark. App. 262, 998 S.W.2d 763 (1999). However, the trial court's ultimate conclusion that the Double Jeopardy Clause was or was not violated is given no deference. *Id.*

We note first that terroristic-threatening count two and violation of a protective order were based on conduct that occurred after December 3, 2003, and therefore are unquestionably not the subject of this appeal. The second-degree stalking conviction,

however, is affected by double-jeopardy concerns. Although it is a continuous-course-of-conduct offense, the conviction in this case is based in part on conduct that occurred on December 3, 2003. In pertinent part, Arkansas Code Annotated section 5-71-229 states:

> (b)(1) A person commits stalking in the second degree if he purposely engages in a course of conduct that harasses another person and makes a terroristic threat with the intent of placing that person in imminent fear of death or serious bodily injury or placing that person in imminent fear of the death or serious bodily injury of his or her immediate family.

The acts constituting the stalking were repeated harassing phone calls that were the basis of the harassing-communication charge and the terroristic threat was the threat made to Branning's then father-in-law on December 3, 2003. The first count of terroristic threatening[2] involved the same December 3, 2003, conduct.

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[2] Terroristic threatening can be either a felony or misdemeanor. It is codified in pertinent part as follows:

> (a)(1) A person commits the offense of terroristic threatening in the first degree if:
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> (A) With the purpose of terrorizing another person, he threatens to cause death or serious physical injury or substantial property damage to another person; or
>
> (B) With the purpose of terrorizing another person, he threatens to cause physical injury or property damage to a teacher or other school employee acting in the line of duty.
>
> (2) Terroristic threatening in the first degree is a Class D felony.
>
> (b)(1) A person commits the offense of terroristic threatening in the second degree if, with the purpose of terrorizing another person, he threatens to cause physical injury or property damage to another person.

In *Mason v. State*, 361 Ark. 357, 206 S.W.3d 869 (2005), our supreme court discussed at length the applicability of the concept of collateral estoppel in our double-jeopardy jurisprudence. The rule of collateral estoppel is "simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* (citing *Ashe v. Swenson*, 397 U.S. 436 (1970)). The supreme court noted further that for collateral estoppel to bar a criminal prosecution, two factors must be present: (1) both adjudicatory entities must be arms of the same sovereign and (2) a factual issue essential to the first verdict must be an essential element of the second charge. *Id.* In the instant case, it is beyond dispute that the "same sovereign" requirement is met. Likewise, the convictions for the first count of terroristic threatening and second-degree stalking are based on conduct that resulted in charges filed in Harrison District Court.

The final question therefore is whether the nolle prossing of the misdemeanors harassing communications and terroristic threatening constituted a resolution of these charges by "a valid and final judgement." *See id.* We find the answer to that question in the trial court's findings of fact in its order denying Branning's double jeopardy and speedy trial motions. There the trial court found that "the charges of Harassing Communications and

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> (2) Terroristic threatening in the second degree is a Class A misdemeanor.

Ark. Code Ann. § 5-13-301 (Repl. 2006)

Terroristic Threatening based on the conduct on or about the 3rd day of December, 2003, were *nol prossed* by the State as part of the agreed upon disposition in District Court."

We are mindful that the State asserts that this case is controlled by *McKinney v. State*, 215 Ark. 712, 223 S.W.2d 185 (1949), where Justice George Rose Smith stated "the State's dismissal of a case before the trial has begun does not prevent subsequent prosecution." However, we believe the holding in *McKinney* is inapposite because the instant case does not simply involve the dismissal and refiling of the charges, but rather a full resolution of the charges. We therefore reverse and dismiss Branning's convictions for second-degree stalking and the first count of terroristic threatening.

Branning next argues that the trial court erred in denying his motion for dismissal based on denial of a speedy trial. He asserts that under the Arkansas Rules of Criminal Procedure, he must be brought to trial within one year from the time specified in Rule 28.2. Branning notes that Rule 28.2 recites that "the time for trial shall commence running from the date of arrest where the defendant has been on bail or lawfully at liberty to answer for the same offense or an offense based on the same conduct or arising out of the same criminal episode." He asserts that the time period "clearly commenced on December 3, 2003, the time of [his] arrest on four charges stemming from that day," and his trial was not held until February 21, 2005, and allowing for excluded days, 396 days elapsed before he was brought to trial. We note, however, that the only conviction that would be affected by this argument is count one of terroristic threatening, which we have already disposed of pursuant to

Branning's first point on appeal. We therefore decline to further address this argument.

Affirmed in part; reversed and dismissed in part.

GRIFFEN and BAKER, JJ., agree.